Supreme Court, U.S.
FILED
JUL 19 2002
OFFICE OF THE CLERK

(4)

No. 01-1607

IN THE

Supreme Court of the United States

DICO, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

JON R. MUTH
Counsel of Record
S. GRACE DAVIS
MILLER, JOHNSON, SNELL
& CUMMISKEY, P.L.C.
Attorneys for Petitioner
250 Monroe, N.W., Suite 800
P.O. Box 306
Grand Rapids, MI 49501-0306
(616) 831-1700

174993

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Introduction	1
I. Certiorari Is Necessary Because CERCLA Expressly Recognizes The Property Right Potential In CERCLA Contribution Claims And Because The Contribution Protection Under § 9613(f)(2) Is Not Absolute.	1
II. Certiorari Is Warranted Because The Lower Courts Failed To Apply The Proper Fact-Specific Test To Determine Whether The Fifth Amendment Has Been Violated And, Instead, Created An Untenable Bright-Line Rule.	4
A. This Court Requires A Fact-Specific Analysis That Was Never Applied.	6
B. A Proper Takings Clause Analysis Would Find That The Government's Grant Of Contribution Protection Effects An Unconstitutional Taking Without Just Compensation.	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960) 6, 9

Centerior Serv. Co. v. ACME Scrap Iron & Metal Corp., 153 F.3d 344 (6th Cir. 1998) 4, 7, 8, 9

City of Wichita v. Aero Holdings, Inc., 177 F. Supp. 2d 1153 (D. Kan. 2000) 3

CMC Heartland Partners v. Gen. Motors Corp., No. 92C4449, 1995 WL 1902125 (N.D. Ill. Jan. 24, 1995) 7

Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) 9, 10

General Time Corp. v. Bulk Materials, Inc., 826 F. Supp. 471 (M.D. Ga. 1993) 2, 4

Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917 (5th Cir. 2001) 2

Hammond v. United States, 786 F.2d 8 (1st Cir. 1986) 6, 7

In re Consolidated U.S. Atmospheric Testing Litig. v. Livermore Labs, 820 F.2d 982 (9th Cir. 1987) 6, 9, 10

In re TMI, 89 F.3d 1106 (3d Cir. 1996) 6

Cited Authorities

	Page
Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 1154, 71 L. Ed. 2d 265 (1982)	4-5
Lynch v. United States, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed.1434 (1934)	6
Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)	6
Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997)	8
Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187 (10th Cir. 1997)	8
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 101 S. Ct. 2061 (1981)	4
TRW Inc. v Andrews, 534 U.S. 19, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001)	3
United States v. Cannons Eng'g Corp., 899 F.2d 79 (1st Cir. 1990)	4, 8
United States v. Colo. & E. R & R Co., 50 F.3d 1530 (1995)	5
United States v. Sec. Indus. Bank, 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982)	6

Cited Authorities

	Page
United States v. Union Electric Co., 64 F.3d 1152 (8th Cir. 1995)	4
Waste Management of Penn., Inc. v. City of York, 910 F. Supp. 1035 (M.D. Penn. 1995)	3, 9
United States Constitution:	
Fifth Amendment	*passim*
Statutes:	
42 U.S.C. § 9606	7, 8
42 U.S.C. § 9607	2
42 U.S.C. § 9613	2
42 U.S.C. § 9613(f)(1)	4, 8
42 U.S.C. § 9613(f)(2)	1, 2, 3, 4
42 U.S.C. § 9622(h)	3
42 U.S.C. § 9622(h)(1)	3
42 U.S.C. § 9622(h)(4)	3
42 U.S.C. § 9657	2, 3
42 U.S.C. §§ 9601-9675	1
Rule:	
Fed. R. Civ. P. 24	4

INTRODUCTION

Petitioner, Dico, Inc. ("Dico"), files this consolidated reply to the opposition briefs filed by respondent-chemical companies on May 30, 2002 and by respondent-United States ("the government") on July 1, 2002.

The chemical companies contend that Dico's claims are not protected by the Fifth Amendment because CERCLA, 42 U.S.C. §§ 9601-9675, absolutely prohibits this, or, in the alternative, because there can be no constitutionally protected right absent a final, unreviewable judgment. (Chem. Co. Brf., pp. 14, 18; Gov. Brf., pp. 8-10). These invented theories ignore the language of CERCLA as well as the case-by-case, fact-intensive "takings" analysis that this Court requires.

Contrary to the government's contention (Gov. Brf., p. 8), no federal precedent answers the question before this Court — can CERCLA contribution rights become constitutionally-protected property under the Fifth Amendment after the government forces a PRP to spend millions of dollars in clean-up costs and the PRP spends several years in litigation exercising its contribution rights, but before a final, unreviewable judgment has entered?

CERCLA and common law require an affirmative answer to this question. This petition should be granted because the courts below answered "no," based solely on a circular statutory analysis and without applying this Court's prescribed test for Fifth Amendment takings. Had the court below applied the test, it would have found that Dico's contribution claim is protected by the Fifth Amendment and thus cannot be taken without due process and just compensation.

I. Certiorari Is Necessary Because CERCLA Expressly Recognizes The Property Right Potential In CERCLA Contribution Claims And Because The Contribution Protection Under § 9613(f)(2) Is Not Absolute.

The lower courts held, and respondents contend, that the contribution protection afforded by § 9613(f)(2) is paramount and is not subject to any external limitations or qualifications.

(Chem. Co. Brf., pp. 14-15; Gov. Brf., p. 10). This argument ignores the express language of CERCLA § 9657 and federal case law which imposes additional limits on contribution protection under § 9613(f)(2).

First, Congress recognized in § 9657 of the Act that there are external limits on the contribution protection afforded under § 9613(f)(2). *See General Time Corp. v. Bulk Materials, Inc.*, 826 F. Supp. 471, 477 (M.D. Ga. 1993) (citing § 9657 as proof that Congress recognized the need for due process protection of contribution claims). Indeed, § 9657 expressly recognizes that (1) CERCLA contribution claims can deserve constitutional protection and (2) that when a "taking" results from the application of § 9613(f)(2), the contribution protection must be limited.

Section 9657 is relevant even though it addresses administrative, and not judicial, settlements. CERCLA contribution claims, whether subsequently limited by administrative settlement or judicial consent decree, are all created by § 9607 and governed by § 9613. *See Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 924 (5th Cir. 2001). Further, § 9657 specifies that, in an administrative settlement, contribution protection that tramples a vested contribution right must be limited, rather than compensated. This specification recognizes the inherent problems of compensating the taking in the context of an administrative settlement, which may *exclude* the party whose property is taken. The omission of similar language relating to judicially approved settlements leaves courts the option of limiting the contribution protection or compensating the taking. Congress clearly did not do what respondents suggest: allow the taking and ignore the compensation.

The government's attempt to discount § 9657's specific provision regarding contribution is not only unreasonable, it violates fundamental rules of statutory construction. (Gov. Brf., p. 11). The first sentence of § 9657 is a broad savings/severability provision that covers all of CERCLA.

The government suggests that the second sentence ("the contribution clause"), is more of the same. (*Id.*). This interpretation reduces the contribution clause to surplusage — an impermissible result. *See TRW Inc. v Andrews*, 534 U.S. 19, __, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (citations omitted). Instead, basic rules of statutory construction require that the contribution clause be afforded the independent significance that it was given by Congress in § 9657. Reason requires the same construction. It is significant that Congress expressly recognized that § 9613(f)(2)'s contribution protection, *and this provision alone* from all provisions in the statute, could be inconsistent with and subject to Fifth Amendment protections.

Second, courts have imposed other limits on CERCLA's contribution protection. *See Waste Management of Penn., Inc. v. City of York*, 910 F. Supp. 1035, 1040 (M.D. Penn. 1995) ("*City of York*"); *City of Wichita v. Aero Holdings, Inc.*, 177 F. Supp. 2d 1153, 1175-76 (D. Kan. 2000). In *City of York*, the District Court recognized that when the government seeks an administrative response cost settlement under § 9622(h), it cannot "extinguish liability to private parties for costs [that private parties] have incurred." 910 F. Supp. at 1040. The court held that a § 9622(h) settlement resolved liability to the United States, but by its terms precluded the government from granting contribution protection from third-party claims. 910 F. Supp. at 1040.[1] While a § 9622(h) response cost settlement is not at issue in this case, the limitation of contribution protection that is hardwired into such a settlement

1. Under 42 U.S.C. § 9622(h)(4) "[a] person who has resolved its liability to the United States *under this subsection* shall not be liable for claims for contribution regarding matters addressed in the settlement." (Emphasis added). The *City of York* court held that the phrase "under this subsection" implicated § 9622(h)(1)'s limit of settlement authority to "costs incurred by the United States Government. . . ." 910 F. Supp. at 1040.

verifies that § 9613(f)(2)'s contribution protection is not absolute, but is qualified by and subject to other provisions of CERCLA.

These limitations to § 9613(f)(2)'s contribution protection within CERCLA establish the fallacy of the lower courts' interpretation that § 9613(f)(2) creates *unlimited* contribution protection, trumping the right to contribution under § 9613(f)(1) in any and all circumstances.[2]

II. Certiorari Is Warranted Because The Lower Courts Failed To Apply The Proper Fact-Specific Test To Determine Whether The Fifth Amendment Has Been Violated And, Instead, Created An Untenable Bright-Line Rule.

It cannot be disputed that Dico holds some type of property right or interest in its claims.[3] The question is what degree of

---

2. Contrary to the government's claim, federal precedent does not support the lower courts' decisions in this regard. (Gov. Brf., p. 8) (citing *United States v. Cannons Eng'g Corp.*, 899 F.2d 79 (1st Cir. 1990) and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S. Ct. 2061 (1981)). *Cannons* does not mention the Fifth Amendment, nor does it involve non-settling PRPs who incurred cleanup costs at the time that the consent decree entered. 899 F.2d 79. Further, the Government relies solely on a *Cannons* footnote that disposes of a non-settling PRP's "veiled constitutional argument" by citing *Texas Industries* for the general proposition that "[t]here is no federal right to contribution." 899 F.2d at 92 n.6. *Texas Industries* does not address CERCLA, but held only that the federal antitrust laws do not provide for an express or implied right to contribution. 451 U.S. at 641-42. While the antitrust laws did not provide an express contribution right, CERCLA does. § 9613(f)(1).

3. Courts have described CERCLA contribution claims as property interests subject to due process protection. *Gen. Time*, 826 F. Supp. at 477; *see also Centerior Serv. Co. v. ACME Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998) ("right of contribution" expressly provided by CERCLA); *United States v. Union Electric Co.*, 64 F.3d 1152, 1167 (8th Cir. 1995) (CERCLA contribution claim was "interest" justifying intervention under Fed. R. Civ. P. 24). *See, generally, Logan v. Zimmerman Brush Co.*,

(Cont'd)

constitutional protection must be afforded Dico's claims. The specific factual character of those claims determines whether a taking occurred. The lower courts' approval of the consent decree required a takings analysis.[4] Certiorari is warranted because no such analysis was acknowledged or employed.[5]

(Cont'd)

455 U.S. 422, 428-429, 102 S. Ct. 1148, 1154, 71 L. Ed. 2d 265 (1982) (stating that causes of action are a species of property protected by the United States Constitution).

4. The government claims that "[t]he fact-bound character of the case makes further review unwarranted." (Gov. Brf., p. 11). Very much to the contrary, the avoidance by the courts below of any factual inquiry required in takings analysis requires further review.

Furthermore, while both the chemical companies and the government attempt to bolster their legal arguments with their perception of the "equities," there has never been a hearing, much less a trial, at which contentions could be exposed to the light of proof and cross-examination. Needless to say, Dico believes the proofs would turn out quite differently.

And while the facts of who was included in the negotiations and when is irrelevant to the consideration of the issues raised in Dico's Petition, if those facts were determined at hearing or trial, Dico would show that it declined the invitation to negotiate initially based upon the positions it asserts here, i.e., that no negotiations or resulting settlement could compromise its Fifth Amendment property rights. Dico would also show that it was not kept apprised of the substance of the negotiations between the chemical companies and the government and that, when Dico discovered a draft of the settlement in a deposition of the chemical companies' witness, it asked for and was denied the opportunity to participate in negotiations many months before the consent judgment was filed.

5. The government incorrectly maintains that an "abuse of discretion" review is proper. (*See* Gov. Brf., pp. I, 12). Because Dico's Petition challenges the lower courts' interpretation of CERCLA and its relationship to the Fifth Amendment, not the fairness of the consent decree itself, this is a legal question for *de novo* review. *See United States v. Colo. & E. R & R Co.*, 50 F.3d 1530, 1534 (1995) (*de novo* review of district court's interpretation of CERCLA).

A. This Court Requires A Fact-Specific Analysis That Was Never Applied.

The chemical companies proffer the illusion that contribution actions between joint tortfeasors are subject to a per se rule: they do not vest until they are reduced to a final, unreviewable judgment. (Chem. Co. Brf., p. 18) (citing *Hammond v. United States*, 786 F.2d 8, 11-12 (1st Cir. 1986) and *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996)). This Court has eschewed such a bright-line rule, requiring instead an *ad hoc* factual inquiry to determine whether a taking of protected property has occurred. *See In re Consolidated U.S. Atmospheric Testing Litig. v. Livermore Labs*, 820 F.2d 982, 989 (9th Cir. 1987) (citing *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978), and cited in *TMI*, 89 F.3d at 1113).

In fact, the very cases cited by the chemical companies in support of this bright-line rule undermine it. *Hammond* and *TMI* acknowledge federal precedent that does not follow the chemical companies' rule. *Hammond*, 786 F.2d at 11; *TMI*, 89 F.3d at 1113 (citing *Livermore Labs*, *supra*). That precedent, as well as *Hammond*, assess the specific facts of the case to determine the nature of the right and whether there was a taking. 786 F.2d at 11. *See also United States v. Sec. Indus. Bank*, 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982) (retrospective 1978 Act's invalidation of acquired liens constituted taking); *Lynch v. United States*, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934) (Economy Act's repeal of insurance constituted taking); *Armstrong v. United States*, 364 U.S. 40, 48, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960) (holding that a subcontractor's lien constituted a vested property right subject to Fifth Amendment protections from executive branch action).[6]

6. A critical distinction between the instant case and both *Hammond*, *supra*, and *TMI*, *supra*, is that the claims at issue in those cases were extinguished by Congressional action — by passage of retroactive legislation. Here, Dico's claims were snuffed out by administrative action that is contrary to the enabling statute. Thus, unlike an act of Congress, the governmental action at issue here is not clothed in a presumption of constitutionality. *See, e.g., Hammond*, 786 F.2d at 12.

Neither the chemical companies nor the precedent upon which they rely adequately distinguish federal precedent, including decisions by this Court, holding that a pending cause of action can vest before it is reduced to a final judgment. (*See* Pet. Brf., pp. 17-18) (citing cases). *Hammond* distinguishes some of these cases because the rights vested in some form separate from the statute creating the right (e.g., real property, contract, or a fixed sum). *Hammond*, 786 F.2d at 11.

In this case, Dico's claims became fixed in a distinct and concrete manner, independent of the abstract statutory right, in several ways.

First, Dico's claims vested in the real property that Dico remediated.

Second, Dico's claims vested in the Unilateral Administrative Order ("UAO") issued against it.[7] UAOs require a targeted party to comply with an EPA-defined remediation objective and, due to "the heavy penalties for non-compliance and the impossibility of seeking judicial review in advance" of complying, effectively puts the EPA's actions beyond legal challenge. *See CMC Heartland Partners v. Gen. Motors Corp.*, No. 92C4449, 1995 WL 1902125, *2 (N.D. Ill. Jan. 24, 1995) (UAO's described as "grossly unfair") (internal citations omitted). While a UAO does not specify a fixed sum, it more oppressively specifies the scope of work and requires the PRP to expend *whatever sums necessary* to complete that work to the government's satisfaction. A UAO also operates like an unreviewable judgment because PRP's are prohibited from challenging the fairness of the UAO until after the PRP has complied with it.

Third, Dico's claims also became manifest and fixed when it completed the assigned remediation at a cost of $5.7 million. Indeed this fact alone distinguishes Dico's contribution rights

---

7. An UAO is issued under the authority of § 9606 and addresses environmental emergencies. *See Centerior Serv.*, 153 F.3d at 346 n.4. Noncompliance may be penalized at up to $25,000 per day in addition to damages *up to three times* the cost of cleanup. *See id.*

from those asserted by non-settling PRPs who contested contribution protection offered in settlements in federal precedent. *See, generally, Cannons*, 899 F.2d 79.

Fourth, Dico's rights were fixed and independently established when Dico filed and aggressively pursued its contribution claim. CERCLA permits a PRP to file its contribution claim once the government issues the UAO against it.[8] In fact, the statute of limitations begins running almost immediately thereafter.[9] Thus, CERCLA requires PRPs like Dico to further invest in their contribution rights by filing suit, which Dico did. Dico's investment in its claim was significant and well-known to the government — it spent two years and approximately $300,000 vigorously pursuing its contribution claims before those claims were extinguished by entry of the consent decree in this case.

The chemical companies' insistence that Dico's rights do not vest until all response costs are known and incurred and a final judgment has entered would render the promise of contribution wholly illusory. (Chem. Co. Brf., p. 11). Future "operations & maintenance" and oversight costs of this Site, as well as many other sites, continue to be incurred for many years, if not decades. But the statute of limitations on contribution claims runs in only three or six years (depending on the type of contribution claim). The chemical companies's position would force PRPs like Dico into an untenable dilemma of having to file and litigate a contribution claim that is subject to complete divestiture until all site-related costs are incurred, a judgment is won, *and* all appeals are exhausted.

---

8. CERCLA § 9613(f)(1) expressly allowed Dico to file its contribution claim once the UAO was issued, i.e., "during or following" a § 9606 UAO action.

9. The statue of limitations began running against the claims once Dico began "physical on-site construction of the remedial action. . . ." *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1193 (10th Cir. 1997); *Centerior Serv.*, 153 F.3d at 354-55; *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1305-06 (9th Cir. 1997).

Certiorari is required because the opinion below adopted this untenable bright-line rule instead of applying this Court's required *ad hoc* and fact-sensitive inquiry.

B. A Proper Takings Clause Analysis Would Find That The Government's Grant Of Contribution Protection Effects An Unconstitutional Taking Without Just Compensation.

The test that the lower courts should have applied, but did not, asks first whether "property" is at issue, and second whether a "taking" occurred. *See Livermore Labs*, 820 F.2d at 988. Here, only the "property" question is at issue because the government completely extinguished Dico's claims, (i.e., if the claims are protected "property," a "taking" occurred). *See Armstrong*, 364 U.S. at 46-48 (destruction of claimants property rights, which had compensable value, was "taking").

This Court has recognized several facts "of particular significance," including the economic impact of governmental action, the interference with investment-backed expectations, and the character of the governmental action. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 523-24, 118 S. Ct. 2131, 2146, 141 L. Ed. 2d 451 (1998). Applying the "significant" factors to Dico's situation proves that a taking occurred. Most compelling among the factors is Dico's investment-backed expectation that it could expect to recoup costs that it incurred, but that were attributable to third parties, through Dico's statutory right to contribution. *See Centerior Serv.*, 153 F.3d at 348. Dico already spent over $5.7 million to comply with the UAOs, and spent an additional $300,000 along with over two years in litigation pursuing its "investment-backed" recovery of contribution costs when the government decided to extinguish Dico's claims. Clearly, Dico had reached a point where it could reasonably expect to recoup money it was ordered by EPA to spend on behalf of other polluters (e.g., chemical companies). *See City of York*, 910 F. Supp. at 1043 ("constitutional concern is greatest . . . where there are substantial costs incurred privately beyond those incurred by the Government").

Also compelling is the nature of the governmental action in this case. Dico incurred the cleanup costs for which it seeks contribution under a UAO. Were it not for the existence of contribution rights against other responsible parties, the essence of the UAO itself might be considered a taking. To eliminate the contribution right, as the government did to Dico, converts the merely "grossly unfair" UAO into an all-powerful and unreviewable governmental ultimatum without check or balance. Here, the government left Dico holding a $6.0 million-dollar bag. *Compare Apfel*, 524 U.S. at 527 (other provisions that mitigate the economic impact on an individual party provides fairness to governmental action); *Livermore Labs*, 820 F.2d at 989 (no taking when alternate avenue for recovery remained).[10]

These facts establish that Dico's property right was taken without just compensation in violation of the Fifth Amendment.

CONCLUSION

For the reasons stated here and in Dico's Petition, Dico requests that this Court grant its petition for certiorari.

---

10. It is also significant that the chemical companies paid the EPA roughly $2.5 million pursuant to the consent decree. The EPA had estimated its response costs at less than $1.3 million. Thus, the EPA was receiving over $1.2 million for which it bore no corresponding cost. Given this windfall, the EPA's opinion regarding the fairness of the settlement was, at a minimum, suspect. It is also significant that, while the NBAR set the chemical companies' "fair share" at 39% (which Dico claims to be grossly low), they actually paid only 29% (i.e., $2.5 million of the total $8.6 million in estimated costs). (*See* Chem. Co. Brf., pp. 2 ($8.6 million) & 4 ($2.5 million)).

Respectfully submitted,

JON R. MUTH
Counsel of Record
S. GRACE DAVIS
MILLER, JOHNSON, SNELL
& CUMMISKEY, P.L.C.
Attorneys for Petitioner
250 Monroe, N.W., Suite 800
P.O. Box 306
Grand Rapids, MI 49501-0306
(616) 831-1700